



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 21st day of May, 1997

Served: May 21, 1997

Application of

JAPAN AIRLINES COMPANY, LTD.

for an exemption under 49 U.S.C.
section 40109

Dockets OST-95-971
OST-95-842
OST-96-1500

ORDER GRANTING EXEMPTION

Summary

In this order we are granting Japan Airlines Company, Ltd. (JAL), a foreign air carrier of Japan, an exemption from section 41301 of Title 49 of the U.S. Code to conduct scheduled combination services (1) between Tokyo and Kona, Hawaii, and (2) between Tokyo and Atlanta, Georgia, for a period of 179 days.¹

Background

During 1985 and 1989 the United States and Japan signed interim agreements, embodied in Memorandums of Understanding (1985 MOU and 1989 MOU), which provide for, among other things, certain services by the designated carriers of Japan.

¹ JAL holds a foreign air carrier permit issued by Order 70-8-66. JAL also holds various exemptions to perform specified services between Japan and the United States.

JAL holds exemption authority under the 1985 MOU (most recently granted by Order 96-12-37, October 17, 1996), to conduct scheduled combination services (1) between Tokyo and Atlanta and (2) between Tokyo and Seattle, and to coterminize Atlanta and Seattle in conjunction with its Tokyo-Atlanta authority. This authority is effective through October 17, 1997. JAL holds exemption authority under the 1989 MOU (most recently granted by Order 97-3-41, March 28, 1997), to conduct scheduled combination services between Tokyo and Kona. This authority is effective through October 25, 1997.

Under the 1985 MOU, JAL's services to Atlanta are limited to seven frequencies per week. Under the 1989 MOU, JAL's services to Kona, which are included in the totals of frequencies being used by other Japanese carriers under the 1989 MOU, are currently limited to three per week.²

Application

By application filed December 2, 1996,³ JAL seeks to conduct scheduled combination services (1) between Tokyo and Atlanta (services now conducted under the 1985 MOU) under the 1989 MOU, and (2) between Tokyo and Kona (services now conducted under the 1989 MOU) under the 1985 MOU, effectively switching the MOU's under which it will be conducting its Atlanta and Kona services.⁴ By serving Kona under the 1985 MOU and Atlanta under the 1989 MOU, JAL can operate up to seven weekly frequencies to Kona and three to Atlanta. JAL proposes to commence both services on or about June 1, 1997, and requests that the authorities be granted for a period of not less than one year.

In support of its requests, JAL states that the authorities requested are consistent with the 1989 and 1985 MOU's. JAL further states that it has been designated by the Government of Japan to perform the proposed services; and its services will benefit the traveling public.⁵

² Section III of the 1989 MOU provides that the total weekly frequencies for operation of services under the MOU shall be twenty four (24) flights for the United States and twenty-three (23) flights for Japan.

³ Answers to JAL's applications were due by December 17, 1996. However, on December 13, 1996, United Air Lines requested an extension of the due date for filing answers until January 6, 1997. By notice dated December 17, 1996, we extended the procedural dates in this proceeding with the consent of all parties served.

⁴ See Dockets OST-95-971 and OST-95-842, respectively .

⁵ By Diplomatic note E-110, the Government of Japan changed its selection for Japan Airlines from Atlanta to Kona under the 1985 MOU and from Kona to Atlanta under the 1989 MOU.

Responsive Pleadings

Answers to JAL's request were filed by the Hawaii Parties (the State of Hawaii and the County of Hawaii), United Air Lines, Inc. and Northwest Airlines, Inc.

The Hawaii Parties support approval of JAL's requests stating that the proposed services will advance the economic interests of Hawaii and the United States. United urges us to approve JAL's requests provided that we conclude that the Government of Japan is prepared to grant comparable approval to changes in U.S. carrier Third and Fourth Freedom schedules. Northwest urges denial of JAL's requests due to Japan's refusal to allow Northwest to operate bilaterally-authorized Fifth Freedom services beyond Osaka to Jakarta, Indonesia, with full traffic rights.⁶

Reply comments were filed by JAL, the State of Hawaii, the Port of Seattle and Northwest.⁷

JAL states that the issues raised by Northwest and United should be addressed in the context of bilateral aviation consultations and again urges us to grant its requests for a period of not less than one year. Hawaii states that it is sympathetic to the concerns raised by Northwest, but argues that we should not interfere in Hawaii's "vital air transportation system" by withholding "undisputed" Third and Fourth Freedom rights from JAL as a means of resolving outstanding Fifth Freedom issues with Japan. Seattle supports Northwest's position and believes that we should withhold this authority from JAL until Japan is forthcoming with Northwest's rights under the Agreement.

On January 27, 1997, United filed an additional pleading stating that it agrees with Northwest that Japan should honor U.S. carrier rights to implement Fifth Freedom services beyond Japan, but advocates normalizing the Third and Fourth Freedom services of United and JAL before engaging the Japanese on outstanding Fifth Freedom issues.⁸ United states that its services, and those of Northwest, are valuable rights that should be routinely approved by Japan consistent with its obligations under the Agreement.

⁶ On July 3, 1996, Northwest filed a complaint under 49 USC § 41310 against the Government of Japan in response to Japan's refusal to authorize Northwest's proposed Seattle-Osaka-Jakarta, Indonesia services, in violation of the U.S.-Japan bilateral aviation agreement (the Agreement). See Docket OST-96-1500.

⁷ Reply comments filed by Hawaii and Northwest were accompanied by motions to file otherwise unauthorized documents. We grant the motions of Hawaii and Northwest.

⁸ United's consolidated response was accompanied by a motion to file an otherwise unauthorized document. We grant United's motion.

Motion of Northwest Airlines

On January 23, 1997, Northwest filed a motion in this proceeding seeking immediate enforcement of its July 3, 1996, complaint against Japan for its refusal to authorize Northwest's Osaka-Jakarta services.⁹ In support of its motion, Northwest states that recent informal discussions between the United States and Japan have not produced any resolution of Northwest's concerns, and, that we should now take appropriate action against Japan to resolve Northwest's complaint. Northwest urges us to immediately find that Japan has violated the Agreement and to sanction JAL by denying its request to conduct Tokyo-Kona services. Northwest argues that its proposed sanction would be an appropriate proportionate response to Japan's refusal to permit Northwest to conduct bilaterally-authorized services in the Osaka-Jakarta market.

Answers in response to Northwest's motion were filed by the Port of Seattle, JAL, United and the State of Hawaii.¹⁰

The Port of Seattle supports Northwest's motion to enforce sanctions against Japan by denying JAL's request to serve the Tokyo-Kona market. JAL argues that Northwest's motion should be denied and states that Northwest is merely rehashing old arguments which should be addressed through bilateral negotiations.

United believes that we should approve JAL's requests and notes that Japan's Minister of Transport recently announced that Japan is prepared to take a more flexible approach to the issue of U.S. carrier Fifth Freedom rights beyond Japan. United believes that we should approve JAL's request while we seek a resolution of the Fifth Freedom issue in the context of bilateral aviation negotiations with Japan.

Hawaii urges us to deny Northwest's motion and states that Hawaii should not bear the economic brunt of this dispute. Hawaii adds that Third and Fourth Freedom rights should not be held hostage to disputes over Fifth Freedom rights and argues that the sanction sought by Northwest would violate our principle of proportionality.

⁹ In support of that complaint, Northwest states that as a U.S. carrier designated under the Agreement, it is entitled to operate without restriction between the United States to Tokyo, Osaka and Naha, Japan, and beyond Japan to points of Northwest's choosing with full traffic rights between Japan and beyond points, subject only to ex post facto review by Japan.

¹⁰ United's and Hawaii's pleadings were accompanied by motions to file otherwise unauthorized documents. We grant the motions.

Decision

We have decided to grant JAL the exemption authorities it seeks to engage in scheduled foreign air transportation of persons, property and mail (1) between Tokyo, Japan, and Atlanta, Georgia, and (2) between Tokyo, Japan, and Kona, Hawaii. Both routes may be served on a non-stop basis. The authorities will be effective for a period of 179 days from the service date of this order, and will be subject to the terms and conditions of JAL's foreign air carrier permit and the 1989 or 1985 MOU, respectively.¹¹ The requested authorities are provided for in the appropriate MOU and JAL has been designated by its government to perform the services requested.

While we are sensitive to the concerns raised by Northwest, we do not regard this as the appropriate forum for addressing them. By Order 97-2-10, issued February 13, 1997, we found that the Government of Japan, through its inaction on Northwest's request to implement services beyond Osaka to Jakarta, violated the provisions of the Agreement and related understandings between the United States and Japan, warranting our action under 49 U.S.C. section 41310. We also noted that further discussions with Japan were imminent and decided that the public interest would best be served if we deferred action on the implementation of sanctions while discussions with Japan were on-going.

Delegations representing the United States and Japan held talks aimed at exploring various issues in the relationship, including the issue raised by Northwest here and in its complaint. In view of these discussions, and in the interest of maximizing the possibility for a positive outcome, in our judgement the appropriate course of action here is to grant JAL's requests, albeit for a limited-term, while we seek to reach an understanding with Japan on a number of aviation issues in the U.S.-Japan market. We believe that our limited award of authority here balances the interests of all parties in this proceeding while preserving our options in the event that future circumstances warrant a different result.

ACCORDINGLY,

1. We grant Japan Airlines Company, Ltd. an exemption from section 41301 of Title 49 of the U.S. Code to permit it to engage in scheduled foreign air transportation of persons, property and mail between Tokyo, Japan, and Atlanta, Georgia, on a non-stop basis (subject to the conditions of the 1989 MOU);

¹¹ Since the duration of JAL's authorities are for a period of fewer than 180 days, these are not licenses with reference to activities of a continuing nature within the meaning of 5 USC 558(c). See 14 CFR Part 377.

2. We grant Japan Airlines Company, Ltd. an exemption from section 41301 of Title 49 of the U.S. Code to permit it to engage in scheduled foreign air transportation of persons, property and mail between Tokyo, Japan, and Kona, Hawaii, on a non-stop basis (subject to the conditions of the 1985 MOU);
3. The authorities granted in ordering paragraphs 1 and 2 above shall be effective for 179 days from the service date of this order;
4. The authorities granted in ordering paragraphs 1 and 2 above are subject to the conditions of Japan Airlines' foreign air carrier permit (Order 70-8-66);
5. We grant the motions of the State of Hawaii; Northwest Airlines, Inc. and United Air Lines, Inc. to file otherwise unauthorized documents;
6. To the extent not granted, we deny any additional requests for relief in Dockets OST-95-971 and OST-95-842;
7. We may amend, modify or revoke this authority at any time and without hearing; and
8. We will serve a copy of this order on Japan Airlines Company, Ltd.; Northwest Airlines, Inc.; United Air Lines, Inc.; the State of Hawaii; the County of Hawaii; the Port of Seattle; the Embassy of Japan in Washington, D.C.; the Department of State (Office of Aviation Negotiations) and the Federal Aviation Administration (SF-IFO).

By:

CHARLES A HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)